No. 77-1155

In the Supreme Court of the United States

OCTOBER TERM, 1977

DOMINGA SANTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A-4 to A-5).

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1978. The petition for a writ of certiorari was filed on February 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a police officer's testimony that he told another officer that petitioner had marked money, or an officer's testimony that he had seen petitioner on seven prior occasions, was erroneously admitted in evidence.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] She was sentenced to three years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. A-4 to A-5).

The government's evidence showed that on August 16, 1974, officer Michael Gilletti of the narcotics unit of the Philadelphia Police Department arranged to purchase heroin from Patricia McCafferty (Tr. 2-16). Gilletti recorded the serial numbers of $110 in marked bills and drove to meet McCafferty (Tr. 2-17). She directed him to North Philadelphia, where she took the marked money and entered a house at

[1] Petitioner's co-defendants Patricia McCafferty and William Alejandro pleaded guilty.

Petitioner's pre-trial motion to suppress heroin and marked money seized during and after her arrest on August 16, 1974, was granted by the district court. The government appealed from that ruling, and the court of appeals affirmed. On June 24, 1976, this Court reversed. *United States* v. *Santana*, 427 U.S. 38. The present trial followed in April 1977.

2311 North Fifth Street (Tr. 2-19). Approximately five minutes later, she returned to the car and gave Gilletti several packets of powder (Tr. 2-21). Gilletti then drove about a block and a half and pulled over to the side of the road, where Sergeant Pruitt and other police officers met him. Gilletti then identified himself to McCafferty as a police officer and placed her under arrest (*ibid.*). Gilletti also told Sgt. Pruitt, on the basis of information volunteered by McCafferty, that the $110 in marked bills that he had given McCafferty was now in petitioner's possession (Tr. 2-22, 2-25).

Sgt. Pruitt and other officers immediately returned to 2311 North Fifth Street, where they saw petitioner standing in the doorway (Tr. 2-28). They identified themselves as police officers and ran to the front door. Petitioner turned to retreat into the house. When the officers caught her in her vestibule, she dropped a brown paper bag, out of which fell two bundles of glazed paper packets containing a white powder (Tr. 2-29 to 2-30). The bag also contained 13 additional bundles of glazed paper packets. Meanwhile, co-defendant William Alejandro grabbed the two bundles of heroin that petitioner had dropped and tried to escape from the house, but he was subdued (Tr. 2-30). Petitioner was arrested and told to empty her pockets. She produced $70 of the recorded and marked money from her pockets (Tr. 2-30 to 2-31). The seized bags contained heroin (Tr. 2-49).

ARGUMENT

1. Petitioner objects (Pet. 7-15) to Officer Gilletti's testimony (Tr. 2-21 to 2-23) that "I * * * told Sergeant Pruitt that Mom Santana [*i.e.*, petitioner] had the $110" and "I told Sergeant Pruitt that Mom Santana had the money that was used for that buy." She appears to contend that Gilletti's statement was based on McCafferty's out-of-court statement that petitioner had the money, and that therefore Gilletti's statement itself must be hearsay.[2]

Petitioner fails, however, to recognize that, in order for testimony to be hearsay, it must recount an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Here, Gilletti's account of his earlier statement to Sergeant Pruitt was offered only to provide background information about the events leading up to the arrest, so that Pruitt's subsequent actions in going to petitioner's house would be understandable to the jury (see Tr. 2-12). Since Gilletti's earlier out-of-court statement was recounted only to show that it was made, the testimony was not hearsay. See, *e.g.*, *United States* v. *Zamarripa*, 544 F.2d 978, 982 (C.A. 8); *Nash* v. *United States*, 405 F.2d 1047, 1052-1053 (C.A. 8).

[2] Petitioner's counsel, on cross-examination, elicited from Gilletti that McCafferty had told him that petitioner had the money (Tr. 2-24 to 2-25). To the extent that her own counsel's questioning brought hearsay into the case, petitioner has no basis for complaint.

Petitioner also complains that this testimony was received in violation of Fed. R. Evid. 602, which limits a witness's testimony to matters of which the witness has personal knowledge (Pet. 13-14), and that the court abused its discretion in admitting the testimony, under Rule 404(b), as evidence of other crimes (Pet. 8-12).[3]

At the outset, we note that petitioner's counsel did not raise either of these grounds in objecting to Gilletti's testimony (see Tr. 2-22). In addition, as to petitioner's Rule 602 claim, she fails to recognize that Gilletti was not testifying as to the truth of his earlier assertion that petitioner had the money, but only to the fact that he had made the statement to Pruitt. Gilletti clearly had personal knowledge as to whether he did or did not make the statement, and Rule 602 accordingly was satisfied.

Similarly, the challenged statement did not run afoul of Rule 404(b), because it was not admitted "to prove the character of [petitioner] in order to show

[3] Fed. R. Evid. 602 provides in relevant part:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. * * *

Fed. R. Evid. 404(b) provides:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

that [she] acted in conformity therewith," but rather was admitted for a permissible "other purpose[ ]"—that is, to describe the events leading up to petitioner's arrest. See *Nash* v. *United States*, *supra*, 405 F.2d at 1052; *United States* v. *Volkell*, 251 F.2d 333, 336 (C.A. 2).

If petitioner had wished to limit the jury's use of Gilletti's testimony, moreover, she should have asked for an appropriate limiting instruction. Fed. R. Evid. 105. In the absence of such a request (see Tr. 2-89, 3-2), petitioner cannot now complain on the basis of speculation that the jury may have used Gilletti's testimony as evidence that petitioner obtained money from McCafferty. In any event, counsel's failure to request such an instruction could not have had any significant effect on the outcome of the case. The government's evidence showed that McCafferty was given marked money with which to buy heroin and that the marked money was found minutes later on petitioner's person. Any inference that the jury could have drawn from Gilletti's testimony would have been simply cumulative and was not crucial to the case.

2. Officer Strohm, one of the arresting officers, testified that petitioner started running after he "hollered 'Police' " (Tr. 2-48), and on redirect examination Strohm stated that he had seen petitioner on at least seven prior occasions (Tr. 2-62). Petitioner contends (Pet. 15-18) that this latter testimony was introduced to attack petitioner's good character and credibility and that this was impermissible because petitioner had not placed these in issue.

As the district court pointed out, however, petitioner's counsel raised the suggestion during cross-examination that petitioner ran because of fright. The challenged testimony was allowable to raise the alternative possibility that petitioner ran because she knew Officer Strohm to be a police officer (Tr. 2-63). The testimony, in short, was relevant to showing flight that could be evidence of guilt, and was admissible for this purpose. See Fed. R. Evid. 404(b).[4]

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[4] The court in its instructions charged that, in determining whether petitioner possessed heroin with the intent to distribute it, the jury could consider testimony that she did not appear to have any evidence of drug use on her arms (Tr. 3-16 to 3-17, 3-30). Petitioner contends (Pet. 18-19) that this charge placed undue emphasis upon particular evidence unfavorable to her.

This instruction was not improper. The court emphasized that such evidence was not conclusive, but merely a factor that could be considered by the jury. Petitioner's counsel was free to argue to the jury that this evidence was of limited probative value unless there was also testimony that no marks were found elsewhere on her body. It was unnecessary for the court to make this point as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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